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83-1183
No.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1983

NEW MOTOR VEHICLE BOARD,
STATE OF CALIFORNIA,
Petitioner,

vs.

CHEVROLET MOTOR DIVISION,
GENERAL MOTORS CORPORATION,
Respondent,

NORTHERN CALIFORNIA MOTOR CAR DEALERS ASSOCIATION, INC., and MOTOR CAR DEALERS ASSOCIATION OF SOUTHERN CALIFORNIA, INC.,
Intervenors.

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is it a denial of due process of law for dealer-members to participate in dealer protest hearings, without any voting authority, as permitted by sections 3050(d) and 3066(d) of the California Vehicle Code, in violation of section 1 of the Fourteenth Amendment to the United States Constitution?

2. For due process purposes is the federal standard identical with that of Article I, section 7 of the California Constitution?

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NORTHERN CALIFORNIA MOTOR CAR DEALERS ASSOCIATION, INC., and MOTOR CAR DEALERS ASSOCIATION OF SOUTHERN CALIFORNIA, INC.,
Intervenors.

PETITION FOR A WRIT OF CERTIORARI

Petitioner New Motor Vehicle Board, State of California, respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeal of the State of California, rendered in this proceeding on August 25, 1983, and on which a petition for hearing was denied by the California Supreme Court on October 20, 1983.

OPINION OF THE COURT BELOW

The opinion of the Court of Appeal is reported as *Chevrolet Motor Division, etc. v. New Motor Vehicle Board* (1983) 146 Cal.App.3d 533; 194 Cal.Rptr. 270, and is attached to the appendix.

JURISDICTION

As above stated, the judgment of the Court of Appeal was entered on August 25, 1983. Thereafter a timely petition for hearing was denied by the Supeme Court of California on October 20, 1983, and this petition for certiorari is being filed within 90 days of that date. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3).

THE STATUTE INVOLVED

The principal statutes involved in this case are sections 3050 subdivision (d) and 3066 subdivision (d) of the California Vehicle Code, as amended in 1979. (Stats. 1979, ch. 340, §§ 1-2, pp. 1206-1207.) Said amendments provide that "a member of the board who is a new motor vehicle dealer may participate in, hear, and comment or advise other members upon, but may not decide, any matter involving a protest filed pursuant to this article."

The comprehensive Code, providing for a New Motor Vehicle Board, its powers and duties, is contained in section 3000, et seq., of the California Vehicle Code.

CONSTITUTIONAL ARTICLES

Section 1, Amendment XIV, of the United States Constitution provides, in pertinent part, that:

> ". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The California Constitution, Article I, section 7, provides in pertinent part that:

> "(a) A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws. . . ."

STATEMENT OF THE CASE

Respondent Chevrolet notified its dealer, 49er Chevrolet, located in Angels Camp, California, of its intention not to renew its dealer franchise when it expired. Pursuant to section 3060[1] the dealer filed a protest. Under section 3060 Chevrolet could not lawfully terminate a dealer's franchise until the protest was heard by the New Motor Vehicle Board. The manufacturer was required to show, at the hearing, that it possessed good cause for terminating the franchise. §§ 3061, 3066(b).

In ascertaining whether or not good cause exists, the Board considers a number of factors, as enumerated in section 3061, such as, for example, the amount of business transacted by the franchisee, magnitude of investment by the franchisee, whether the franchisee fails to fulfill warranty obligations.

The composition of the Board is determined by section 3001, which provides for five (5) public members (non-dealers), and four (4) dealer-members. The dealer-members are appointed by the Governor, who also appoints three (3) of the public members. One public member is appointed by the Speaker of the Assembly, and the other by the Senate Rules Committee.

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[1]All references to code sections are to the California Vehicle Code.

The dealer-members are permitted to participate in protest hearings, but they do not possess a vote, as set forth in section 3066(d).

After a hearing, the Board sustained 49er Chevrolet's protest, and Chevrolet sought a petition for writ of mandate in the San Francisco Superior Court, on several grounds. Primarily, it asserted that it was denied an impartial tribunal by reason of the presence of the dealer-members during the adjudicatory process. The trial court agreed, and issued its writ on the constitutional challenge, plus one other ground, which is not at issue before you. The Court of Appeal considered only the constitutional issue, and affirmed the judgment below. The Board, the real party in interest, and the intervenor, Northern California Motor Car Dealers Association, et al., then petitioned the State Supreme Court for a hearing, asserting several challenges, among which was one that, where a tribunal decides a case on other grounds, it should defer consideration of the constitutional issue, and also on grounds that the amendments to the respective statutes were in fact constitutional.

The California Supreme Court, the highest in the State, denied the petition, without comment, on October 20, 1983.

Although in its petition to the trial court Chevrolet asserted that the dealer-members' participations violated the California Constitution as well as the United States Constitution, neither the trial court nor the Court of Appeal indicated that the decision was predicated on the California Constitution. Both forums spoke only of a denial of due process. (Minute Order, California Court of Appeal's

Clerk's Transcript, page 237, lines 1-5 and page 237, line 26 to page 238, line 15, and Court of Appeal decision.)

REASONS FOR GRANTING THE WRIT

1. The Court Below Acted On The Federal Due Process Clause, And Did Not Even Consider A Separate, California Constitutional Standard

Although the manufacturer included the California Constitution in its petition for writ of mandate, it seems clear that neither the trial court nor the Court of Appeal considered it as a separate, or different, basis for arriving at its decision. Indeed, no California cases striking down statutes for failure to comply with the California due process clause were presented to either the trial or appellate courts. Possibly this is because there is no California case law on the subject as it pertains to a civil matter.

The case that was cited, and relied upon below, was that of *American Motors Sales Corp. v. New Motor Vehicle Board* (1977) 69 Cal.App.3d 983. That case, in turn, relied upon decisions of this court, such as *Tumey v. Ohio* (1927) 273 U.S. 510; 71 L.Ed. 749; 47 S.Ct. 437; *Ward v. Village of Monroeville* (1972) 409 U.S. 57; 34 L.Ed.2d 267; 93 S.Ct. 80; and *Gibson v. Berryhill* (1973) 411 U.S. 564; 36 L.Ed.2d 488; 93 S.Ct. 1689. While it is true that other federal decisions were noted in *American Motors,* no California cases were cited, or considered, since no favorable California case law (to the challengers), had been developed relating to its due process clause.

Since the appellate court in this case relied on *American Motors,* and that case in turn relied on the federal cases, it is clear that only the Fourteenth Amendment due process clause was the basis for the decision.

The appellate court did mention one California case, that of *Andrews v. Agricultural Labor Relations Board* (1981) 28 Cal.3d 781; 171 Cal.Rptr. 590. But *Andrews* is not on point in that the California Supreme Court, in deciding *Andrews,* did not consider any California appellate decisions on due process.

Actually, the few California cases that have considered the State's due process clause have concluded that it *is identical* in scope and purpose with the due process clause of the federal constitution. *Gray v. Whitmore* (1971) 17 Cal.App.3d 1, 20; 94 Cal.Rptr. 904; *Abstract Investment Co. v. Hutchinson* (1962) 204 Cal.App.2d 242, 245; 22 Cal. Rptr. 309.

Although recently, in dicta, the California Supreme Court indicated it was not necessarily bound by the same standard, in the case of *Kruger v. Wells Fargo Bank* (1974) 11 Cal.3d 352, 367, fn. 21; 113 Cal.Rptr. 449, the expression was not necessary to the decision rendered, and is therefore but dicta. *No court yet, in California, has applied a different standard* to the State's due process clause than that applicable to the federal standard. Certainly neither of the state courts below did, so they are looking to this court, and its decisions, for the correct standard.

And, it is submitted, the state forums erred in concluding that the statutes violated due process.

2. Participation By The Dealer-Members Does Not Violate Due Process Principles

The most salient point in the litigation below was that the state judiciary concluded as a matter of law that participation by non-voting dealer-members in the adjudica-

tive process was an inherent denial of due process, without need for evidence to demonstrate an actual bias, or "financial stake" on the part of the litigators.

This conclusion ignores such cases as *Dugan v. Ohio* (1928) 277 U.S. 61; 72 L.Ed. 784, 48 S.Ct. 439, where a challenge of "imputed bias" was made to a "mayor-judge" on grounds his salary was paid from the general fund in which fines he levied were deposited. The court concluded his relationship to the fund was too remote to infer bias. Thus, by inference, this Honorable Court required more than just a conclusion, but actual evidence as to bias. As noted in the Court of Appeal decision, no challenge or evidence of actual bias was ever submitted in the instant case.

This Court's precedential decision in *Withrow v. Larkin* is also applicable herein, and further supportive of the requirement of a showing of actual bias, or adverse interest. *Withrow v. Larkin* (1975) 421 U.S. 35; 43 L.Ed.2d 712; 95 S.Ct. 1456. In that case you refused to hold, as a matter of law, that a licensing board was a biased tribunal and you further held that bias could be established only when it can be shown that an adjudicator has a direct pecuniary interest in the outcome of the dispute, or has been the target of personal abuse from one of the parties to the dispute over which he presides, or considers.[2]

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[2]The California Appellate Court failed to consider an administrative regulation of the Board which expressly provides for a factual challenge to any member of the Board. Title 13, California Administrative Code, Section 551.1. (Copy of Text attached in appendix.) The Court also ignored section 3010, which provides that a quorum for protest hearings only requires three (3) public members. (Copy attached, appendix.)

No evidence was ever introduced in these proceedings to demonstrate an adverse interest, pecuniary or otherwise, on the part of any of the dealer-members. California Administrative Code, Title 13, section 551.1 provides for such factual challenges, and thus assures full due process to all parties, including the manufacturers.

In accordance with *Withrow*, this court also handed down a similar decision in *Hortonville District v. Hortonville Association* (1976) 426 U.S. 482; 49 L.Ed.2d 1; 96 S.Ct. 2308. (No showing of financial or personal interest on the board of the deciding body.)

3. Protection Of Automobile Dealers From Arbitrary Treatment By Manufacturers Is A Matter Of Great National Importance, As Recognized By This Court, And It Should Correct The American Motors Error

Once before this Court had been called upon to examine a constitutional issue relating to California's Automobile Franchise Act, as originally enacted in 1973 (Stats. 1973, ch. 996.) *New Motor Vehicle Board of California v. Orrin W. Fox Co.* (1978) 439 U.S. 96, 100-101; 58 L.Ed.2d 361; 99 S.Ct. 403. As the Court noted, at pages 100-101:

> "The disparity in bargaining power between automobile manufacturers and their dealers prompted Congress and some 25 States to enact legislation to protect retail car dealers from perceived abusive and oppressive acts by the manufacturers. California's version is its Automobile Franchise Act."

See, too, the footnote (4) at page 100 of *Orrin W. Fox Co.* wherein it is cited the report of the Congressional Committee as reported in 1956, and the further footnotes on the purpose of these laws at pages 101-102, footnotes 5-7.

Moreover, the issue of "due process" has cropped up in other states with similar laws, and the results have been different than the California Court of Appeal in *Chevrolet*. Cf. *Ford Motor Company v. Pace* (Tennessee 1960) 335 S.W.2d 360, 367; *General GMC Trucks, Inc. v. General Motors Corp.* (Georgia 1977) 239 Ga. 373; 237 S.E.2d 194, 195-196; *General Motors Corp. v. Capitol Chevrolet Company* (Tennessee 1983) 645 S.W.2d 230, 235-238.

Interestly, in *Capitol Chevrolet Company* the Court specifically rejected the *American Motors* holding. In ruling on the contention that all dealers have a pecuniary interest adverse to manufacturers, the Court said: "This is no attenuated and speculative, in absence of actual interest or bias, that we are simply unable to accept it." (645 S.W.2d at 237.)

The bare majority decision, 2-1, in *American Motors* fairly represents an anomaly in the construction of due process. It defies logic and common sense. On what basis can one conclude that a Mercedes dealer-member has an adverse bias, financial, personal, or otherwise, to the manufacturer of Chevrolets or Fords? Such a dealer-member could just as easily, conceivably, harbor a bias toward the Cadillac dealer who appears before him as the protestant to a franchise termination. But can even that fact be assumed? We suggest not. Let the parties prove the purported bias by facts, by evidence, by declarations.

The distinction between the statutes struck down in *American Motors* and in the instant case, is of course, that the prior law permitted the dealer-members to vote in the hearings while the amended statutes do not. *American Motors* was therefore not clear precedent in

the instant case, and, furthermore, it represents an erroneous analysis of due process, as previously indicated. In addition to the cases cited above, several other federal decisions are contra to the conclusions of *American Motors*. See *Laird v. Tatum* (1972) 409 U.S. 1; 925 S.Ct. 2318; 33 L.Ed.2d 154; *Smith v. Phillips* (1982) ..... U.S. .....; 102 S.Ct. 940; 71 L.Ed.2d 78; *Lopez v. Henry Phipps Plaza South Inc.* (2nd Cir. 1974) 498 F.2d 937; *Wolkenstein v. Reville* (2nd Cir. 1982) 694 F.2d 35. California's misconception of what constitutes due process demands correction, which only this Court can give.

CONCLUSION

Due process is a flexible concept, not subject to hard and fast rules, and must be determined from the peculiar facts of each individual case. *Cafeteria Workers v. McElroy* (1961) 367 U.S. 886, 895; 81 S.Ct. 1743, 1748; 6 L.Ed.2d 1230; *Mathews v. Eldridge* (1976) 424 U.S. 319, 334; 96 S.Ct. 893; 47 L.Ed.2d 18.

California's Automobile Franchise Act, and its administrative regulations, contains safeguards to insure that valuable due process rights are not violated. Absent evidence of actual bias, there is no basis for concluding that dealer-member adjudicators, lacking any voting rights, prejudice and deny a manufacturer a fair tribunal.

The decisions below rested on the due process clause of the United States Constitution, and, because of the grossly erroneous interpretation rendered, this Honorable Court should correct the State of California's error.

DATED: January 12, 1984

Respectfully submitted,

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(Appendices follow)

Appendix A

Order Denying Hearing
After Judgment by the Court of Appeal

1st District, Division 3, No. A015529

In the Supreme Court of the State of California
In Bank

Chevrolet Motors Divisions, Etc., Respondent

v.

The New Motor Vehicle Board, Appellant;
49er Chevrolet et al., Real Parties in Interest
and Appellants

Grodin, Jr., did not participate.

[Filed Oct. 20, 1983]

Petitions of appellants DENIED.

/s/ Bird

Chief Justice

Appendix B

Certified for Publication

In the Court of Appeal of the State of California

First Appellate District,
Division Three

A015529

Super. Ct. No. 777974

Chevrolet Motor Division,
General Motors Corporation,
Plaintiff and Respondent,

v.

The New Motor Vehicle Board,
Defendant and Appellant;
49er Chevrolet, et al.,
Real Parties in Interest and Appellants.

[Filed Aug. 25, 1983]

This appeal is from a judgment granting a peremptory writ of mandamus, ordering that a decision of the state's New Motor Vehicle Board (the Board) be set aside. Appellants are the Board, real party in interest 49er Chevrolet (49er), and two associations of car dealers, Northern California Motor Car Dealers Association, Inc. and Motor Car Dealers of Southern California, Inc. (Associations), who were granted leave to intervene below. Respondent is Chevrolet Motor Division, General Motors Corporation (Chevrolet).

I

The relevant facts are as follows. Chevrolet notified 49er, its dealer in Angels Camp, that when their existing franchise agreement expired on October 31, 1980, a new agreement would not be offered. 49er protested to the Board pursuant to Vehicle Code section 3060,[1] which provides in pertinent part that "no franchisor shall terminate or refuse to continue any existing franchise" for the marketing of new motor vehicles "unless" the Board "finds . . . good cause for termination or refusal to continue" the franchise. The Board consists of nine members, four of whom are required to be new motor vehicle dealers. (§§ 3000, 3001.) At a hearing on a dealer-manufacturer dispute, the dealer members of the Board may participate, hear, and comment or advise other members, but they may not "decide" the matter. (§§ 3050, subd. (d), 3066, subd. (d).)

After a hearing, the Board sustained 49er's protest. Chevrolet then filed this action, seeking to require the Board to vacate its decision. The trial court granted the petition for writ of mandate on two grounds: (1) participation of dealer board members in the deliberative process, without participation of manufacturers, deprived the manufacturers of an impartial tribunal, violating due process; and (2) the Board was without jurisdiction to hear 49er's protest as the manufacturer neither "terminat[ed] [n]or refus[ed] to continue any existing franchise" within the meaning of section 3060. This appeal followed.

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[1]Unless otherwise indicated, all statutory references are to the Vehicle Code.

II

When the Board was originally established in 1967 as the New Car Dealers Policy and Appeals Board, it functioned much as do other state occupational licensing boards. Among its duties, for example, was the hearing of appeals by licensed dealers from decisions of the Department of Motor Vehicles. (See Stats. 1967, ch. 1397, § 2, p. 3261 et seq.; see *American Motors Sales Corp. v. New Motor Vehicle Bd.* (1977) 69 Cal.App.3d 983, 986.) Four of the Board's nine members were required to be "new car dealers." (Stats. 1967, ch. 1397, § 2, pp. 3261-3262.)

In 1973 the Legislature renamed the Board the New Motor Vehicle Board, and added sections 3060 to 3069, which established a series of procedures for the adjudication of disputes between dealers and new car manufacturers. (Stats. 1973, ch. 996, § 16, p. 1967-1971.) Among other duties, the Board was empowered to determine whether there is "good cause" to terminate or refuse to continue a franchise. (§ 3060.) The requirement that four of the Board's members be new car dealers was not changed.

In *American Motor Sales Corp. v. New Motor Vehicle Bd., supra,* 69 Cal.App.3d 983, a dealer-franchisee protested a noticed termination to the Board, which found that good cause had *not* been shown. (*Id.,* at p. 985.) As in the present case, the franchisor challenged the Board's decision by petitioning the superior court for relief in administrative mandamus. The superior court granted relief, concluding that sections 3060 and 3066 of the Act violated due process " 'because four of the nine members of the Board are . . . new car dealers, who may reasonably be expected to be antagonistic to franchisors . . . .' " (*Ibid.*)

In a 2-1 decision, the Court of Appeal affirmed, and the Supreme Court denied a petition for hearing. After taking note of "a long history of legal warfare between the automobile manufacturers and their dealers" (*American Motors Sales Corp. v. New Motor Vehicle Bd., supra,* 69 Cal.App. 3d at p. 986), the court found it "unavoidable that dealer-members of the Board have an economic stake in every franchise termination case that comes before them. The ability of manufacturers to terminate any dealership, including that of a Board member, depends entirely upon the Board's interpretation of 'good cause.' It is to every dealer's advantage not to permit termination for low sales performance, which fact however is to every manufacturer's disadvantage." (*Id.,* at p. 987.)

The court acknowledged that in some instances a dealer Board member might be more financially interested in ruling in favor of the manufacturer, i.e., where the franchise of a competitor was being terminated, or where the dealer wished to ingratiate itself with its own manufacturer. The court viewed this not as fairness, but as an equalizing unfairness. "Either way, the objectionable feature of dealer-membership on the Board is the distinct possibility that a dealer-manufacturer controversy will not be decided on its merits but on the potential pecuniary interest of the dealer-members." (*American Motors Sales Corp. v. New Motor Vehicle Bd., supra,* 69 Cal.App.3d at pp. 987-988.)

The court distinguished cases holding that a licensing or regulatory agency may constitutionally be composed in whole or in part of members of the business regulated, on the ground that the members of this Board were no longer merely regulating members of their own occupation. In-

stead, they were regulating the economic and contractual relations of others with members of their own occupation, but ". . . car dealers have no unique or peculiar expertise appropriate to the regulation of business affairs of car manufacturers." (*American Motors Sales Corp. v. New Motor Vehicle Bd., supra,* 69 Cal.App.3d at pp. 990-991.)

The court then stated that the Legislature's "requirement that the nine-man Board consist of at least four car dealers" meant that "[i]n effect it [the Legislature] took sides in all Board-adjudicated controversies between dealers and manufacturers, making certain that the dealer interests would at all times be substantially represented and favored on the adjudicating body. This legislative partisanship damns the Board." (*American Motors Sales Corp. v. New Motor Vehicle Bd., supra,* 69 Cal.App.3d at p. 991.) "[T]he objectionable feature of dealer-membership on the Board is the distinct possibility that a dealer-manufacturer controversy will not be decided on its merits but on the potential pecuniary interest of the dealer-members." (*Id.,* at pp. 987-988.) "Because the challenged Board members have a 'substantial pecuniary interest' in franchise termination cases [citation], their *mandated* presence on the Board potentially prevented a fair and unbiased examination of the issues before it in this case, in violation of due process." (*Id.,* at p. 992, original emphasis, fn. omitted.)

The court concluded as follows: "What we hold is that the combination of (1) the mandated dealer-Board members, (2) the lack of any counterbalance in mandated manufacturer members, (3) the nature of the adversaries in all cases (dealers v. manufacturers), and (4) the nature of

the controversy in all cases (dispute between dealer and manufacturer) deprives a manufacturer-litigant of procedural due process, because the state does not furnish an impartial tribunal." (*American Motors Sales Corp. v. New Motor Vehicle Bd., supra,* 69 Cal.App.3d at p. 992; cf. *General Motors Corp. v. Capitol Chevrolet* (Tenn. 1983) 645 S.W.2d 230; *Ford Motor Company v. Pace* (1960) 206 Tenn. 559 [335 S.W.2d 360]; *Gen. GMC Trucks v. Gen. Motors Corp.* (1977) 239 Ga. 373 [237 S.E.2d 194].)

In reaction to the *American Motors Sales Corp.* decision, the Legislature amended section 3050, subdivision (d), and added subdivision (d) to section 3066 to provide that no member of the Board who is a new motor vehicle dealer may participate in, deliberate on, hear or consider, or decide, any matter involving a dispute between manufacturer and dealer. (See Stats. 1977, ch. 278, §§ 2-3, pp. 1171-1173; *Chrysler Corp. v. New Motor Vehicle Bd.* (1979) 89 Cal. App.3d 1034, 1037). However, in a 1979 enactment which took effect as urgency legislation, the Legislature again amended the statutes, this time providing that dealer members of the Board "may participate in, hear, and comment or advise other members upon, but may not decide," any matter involving a dealer-manufacturer dispute. (§§ 3050, subd. (d), 3066, subd. (d); Stats. 1979, ch. 340, §§ 1-2, pp. 1206-1207.) According to the Legislature's declaration of urgency, the amendment was necessary "[i]n order that the educated and needed advice of New Motor Vehicle Board members who are themselves new motor vehicle dealers may be utilized in the decision making process of the board. . . ." (Stats. 1979, ch. 340, § 3, p. 1207.)

The trial court in this case concluded that the amendments to sections 3050 and 3066 did not "cure the unconstitutionality of the earlier provisions of the statute. . . ." The court reasoned that although dealer-Board members no longer have the right to vote, they have the opportunity fully to participate otherwise in the adjudicatory process, whereas the manufacturers are still left unrepresented.

First, appellants 49er and the Board argue that Chevrolet was not entitled to raise this constitutional question for the first time in the trial court. The general rule is that an issue not raised at an administrative tribunal may not be raised in subsequent judicial proceedings. (See, e.g., *City of Walnut Creek v. County of Contra Costa* (1980) 101 Cal.App.3d 1012, 1019-1020.) However, a litigant who seeks to challenge the constitutionality of the statute under which an agency operates need not raise that issue in proceedings before the agency as a condition of raising the issue in the courts. (See *State of California v. Superior Court* (1974) 12 Cal.3d 237, 250-251; *Chrysler Corp. v. New Motor Vehicle Bd., supra,* 89 Cal.App.3d at pp. 1038-1039.)

Here Chevrolet was seeking a declaration that the statutes prescribing the Board's membership were unconstitutional. The Board itself could not have granted this relief because the Constitution expressly provides that an "administrative agency . . . has no power . . . [t]o declare a statute unconstitutional. . . ." (Cal. Const., art. III, § 3.5.) There was no waiver of Chevrolet's right to raise the constitutional issue in the trial court in these circumstances.

The Board and 49er also argue that Chevrolet should have requested that the dealer members "recuse" themselves from participating. The dealer members of the

Board constituted almost half of its total membership (see §§ 3000-3001), and as members they were authorized to participate in franchise disputes. (See § 3050, subd. (d).) If this argument were accepted, predictably automatic requests for the recusal of dealer members would have the effect of routinely depriving the Board of participation by a substantial number of its members in situations involving one of its basic functions. Clearly their recusal was not intended by the Legislature.

Next, appellants contend that *American Motors* is now of questionable validity, in light of *Andrews v. Agricultural Labor Relations Bd.* (1981) 28 Cal.3d 781. In that case, the Supreme Court held that an administrative law officer with expressed or "crystallized" political or legal views cannot be disqualified on that basis alone, even if those views result in an appearance of bias. (*Id.*, at pp. 791, 793-794.) Appellants reason that the group antagonism and economic conflict between dealers and manufacturers mean that car dealer Board members at most may have "crystallized views" about policy issues in adjudications between manufacturers and dealers. After *Andrews*, appellants urge, absent proof of actual bias, such views are not enough to support a holding that an adjudicator cannot provide a fair tribunal.

However, the *American Motors* court did not find the dealer Board members partial because of their views on issues of law or policy; rather, that court squarely held that those Board members had an "economic stake" in every franchise termination case which came before them. The *Andrews* court itself acknowledged that no proof of

actual bias is required for disqualification when a judicial officer has a financial interest in a case. (*Andrews v. Agricultural Labor Relations Bd., supra,* 28 Cal.3d at p. 793, fn. 5.)

Appellants then argue that the Board is not a biased tribunal and its action in this case did not deny Chevrolet due process because none of the "adjudicator members" of the Board were biased. Appellants emphasize that there is no contention made that any factor exists which could lead a court to find that the five public members of the Board were or are biased. According to appellants, the dealer members' participation in these proceedings was solely to provide expert advice, a function analogous to that provided to other boards or commissions by agency staff members or assistants. (See, e.g., *Porter County Chapter v. Nuclear Reg. Com'n* (D.C. Cir. 1979) 606 F.2d 1363, 1370-1372.)

We are not persuaded by appellants' attempts to minimize the dealer Board members' role in these proceedings. Unlike agency staff, the dealer Board members have a financial stake in every dealer-manufacturer dispute which comes before the Board. (*American Motors Sales Corp. v. New Motor Vehicle Bd., supra,* 69 Cal.App.3d at p. 987.) Nevertheless, they are permitted to participate actively in hearings on dealer-manufacturer disputes, hear the evidence, and comment upon and advise other Board members in such matters. In other words, although they must stop short of actually voting on a dispute, they may take part in every other aspect of the decision-making process, despite their financial interest in the outcome of that

process. The Board has numerous powers and duties other than hearing protests by dealers, and the dealer Board members' participation in those other tasks is unrestricted. (See § 3050.) Because of their ongoing working relationship, public members of the Board may be influenced by arguments or facts suggested by the dealer members but not included in the public record, and the parties themselves may not have the opportunity to respond.

In short, the presence of biased members on the Board presents a substantial probability that decisions in dealer-manufacturer disputes will be made on the basis of inappropriate considerations, and the fact that those members do not technically "decide" the disputes does not alter that probability. Each of the factors enumerated in *American Motors* is still present. The Board is still required by statute to have four dealer members. (See § 3001.) The statute neither requires nor authorizes manufacturer members. (See *ibid.*) The nature of the adversaries and the controversies between them remains the same. These problems have not been remedied by the subsequent changes in sections 3050 and 3066. Accordingly, the trial court did not err when it concluded that participation of the Board's dealer members in these proceedings denied Chevrolet an unbiased tribunal.

In light of our conclusion, we need not consider appellants' contention that the court also erred when it concluded that Chevrolet did not terminate or refuse to continue the franchise within the meaning of section 3060.

Judgment is affirmed.

CERTIFIED FOR PUBLICATION

Scott, J.

We concur:

White, P.J.

Feinberg, J.

EXHIBIT A

California Superior Court

City and County of San Francisco

Department No. 26

Honorable Frank W. Shaw, Judge

No. 777974

Chevrolet Motor Division,
General Motors Corporation,
Petitioner,

vs.

The New Motor Vehicle Board,
Respondent,

49er Chevrolet,
Real Party in Interest.

Minute Order

1. Prior to its amendment in 1979, California Vehicle Code Section 3001 mandated that four out of nine members of the New Motor Vehicle Board be new car dealers. Vehicle Code Section 3060, provided that a dealer franchise may not be terminated unless the board finds good cause for said termination. Vehicle Code Section 3066, provided that a hearing must be held when a protest is registered to the proposed termination of a franchise.

In the case of *American Motors Sales Corp. v. New Motor Vehicle Board* (1977) 69 Cal.App.3d 983, the court held that Vehicle Code Sections 3060 and 3066 were unconstitutional in that they were violative of due process

under California Constitution, Article I, Section 7, and under the Fourteenth Amendment to the United States Constitution. The court held that "the combination of (1) the mandated dealer-Board members, (2) the lack of any counterbalance in mandated manufacturer members, (3) the nature of the adversaries in all cases (dealers v. manufacturers), and (4) the nature of the controversy in all cases (dispute between dealer and manufacturer) deprives a manufacturer-litigant of procedural due process, because the state does not furnish an impartial tribunal." (*American Motors*, supra, p. 992.)

The court further stated that dealer members of the Board have an economic stake in every franchise termination case that comes before them and that it is sufficiently clear that those with substantial pecuniary interest in legal proceedings should not adjudicate these disputes.

In 1979 the legislature amended the vehicle code to provide that "a member of the Board who is a new motor vehicle dealer may participate in . . . hear . . . and comment or advise other members upon, but may not decide, any matter involving a protest" against termination by a manufacturer. (Vehicle Code Sections 3050(d), 3066(d)). According to Senate Bill No. 417, which introduced these amendments, such dealer participation was required to provide educated and needed advice to the Board.

The question presented to the Court in the case at bar is whether said amendments cured the constitutional infirmity found by the court in *American Motors*. This court holds that the 1979 amendments to the Vehicle Code do not cure the unconstitutionality of the earlier provisions of the statute. Although American Motors is not, in this

Court's judgment, dispositive of the issue as to whether or not full participation by dealer-Board members in the hearing process but without the right to vote is unconstitutional, it is the opinion of this court that the participation of dealer-Board members provided for by the 1979 amendments is also unconstitutional under the rationale of American Motors, and for the primary reason that, even though the dealer-Board members no longer have the right to vote, they nevertheless have the opportunity to otherwise fully participate in the adjudicatory process, whereas the manufacturers are left unrepresented, thus depriving the manufacturers of an impartial tribunal. This statutory procedure is clearly violative of due process and is therefore unconstitutional.

It is this Court's opinion that the case of *Andrews v. Agricultural Labor Relations Bd.* (1981) 28 Cal.3d 781, does not overrule the Court of Appeals decision in *American Motors*. The interest involved in the decision making process in the case at bar consists of the dealer-Board members' economic interest in the cases being decided. The plurality opinion in Andrews specifically distinguishes the situation where such an economic interest exists, and states that bias is presumed in that situation.

a. Petitioner did not waive its right to raise its constitutional claims in this court by omitting to make those claims before the Board. Petitioner's challenge was directed to the constitutionality of the New Motor Vehicle Board's enabling legislation, and, as such, was properly made in the trial court. Petitioner could not raise its claim before the Board, because an administrative agency created

by the legislature has no power to declare a state statute unconstitutional.

2. As a second ground for granting the writ of mandate, this Court adopts the language of *Witt v. Union Oil Co.* (1979) 99 Cal.App.3d 435, and finds that it applies to the case at hand insofar as it holds that in order to have a termination of an existing franchise a franchisee must have some period of time remaining on his written agreement, and that there can be no wrongful refusal to continue an existing franchise unless the franchisee had some contractual right to continuation. In the present case, Petitioner did not deprive the real party in interest of any time remaining on its current Dealer Sales and Service Agreement, nor did it refuse to continue any agreement which gave the real party in interest a right to a continuation.

The *Witt* case points out the stark reality that if this Court were to adhere to the interpretation of Vehicle Code Section 3060, which Respondent argues is correct, it would engraft on the franchise agreement a continuing term that could never be terminated except for one or more of the "good cause" conditions enumerated in the section. Thus, a lease with a definite term and no right to continue could become a contract in perpetuity. This Court finds that the legislature did not intend such a drastic amendment to contractual rights and duties between parties to such a contract when it enacted Vehicle Code Section 3060.

Therefore, the Court finds that the Board acted in excess of its jurisdiction in the case at bar.

3. For the foregoing reasons the Petition for Writ of Mandate is granted.

4. No findings of fact and conclusions of law, as provided by Rule 232 of the California Rules of Court, are required in the case at bar. The Court is deciding this case solely on the above enumerated grounds, both of which were decided by this Court as a matter of law. Attorney for Petitioner shall prepare a form of judgment consistent with the Court's order in accordance with Rule 232 of the California Rules of Court.

DATED: July 31, 1981

/s/ Frank F. Shaw

FRANK F. SHAW
Judge of the Superior Court

EXHIBIT B

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Attorneys for The New Motor Vehicle Board

Superior Court of the State of California
City and County of San Francisco

No. 777974

Chevrolet Motor Division,
General Motors Corporation,
Petitioner,

vs.

The New Motor Vehicle Board,
Respondent,
49er Chevrolet,
Real Party In Interest,

Northern California Motor
Car Dealers Association, Inc.,
and Motor Car Dealers
Association of Southern
California, Inc.,

Additional Real Parties In Interest.

Judgment Granting Peremptory Writ of Mandamus

This matter came regularly before this Court for hearing on May 7, 1981. J. Thomas Rosch, Esq., of McCutchen, Doyle, Brown & Enersen, appeared as attorney for petitioner The Chevrolet Motor Division of General Motors Corporation; Gordon Zane, Esq., Deputy Attorney General, appeared as attorney for the respondent the New Motor Vehicle Board ("the Board"); R. E. Wilmshurst appeared for the real party in interest 49er Chevrolet; and James R. McCall, Esq., appeared as attorney for intervenors the Northern California Motor Car Dealer Association, Inc., and Motor Car Dealers Association of Southern California, Inc. All interested parties having therefore received adequate notice and opportunity to be heard, arguments having been presented, good cause appearing for the writ of mandamus, and the Court having issued its August 3, 1981, Minute Order setting forth the grounds for this judgment.

IT IS HEREBY ORDERED that the cause shall be remanded to the Board for disposition not inconsistent with this Court's Minute Order of August 3, 1981.

DATED: August 20, 1981

/s/ Frank W. Shaw

Judge of the Superior Court

Appendix C

551.1. Challenge.

A hearing officer or board member shall voluntarily disqualify himself and withdraw from any hearing or deliberation in which he cannot accord a fair and impartial hearing or consideration. Any party may request the disqualification of any hearing officer or board member by filing an affidavit, prior to the taking of evidence at a hearing, stating with particularity the grounds upon which it is claimed that a fair and impartial hearing cannot be accorded. Where the request concerns a board member, the issue shall be determined by the other members of the board. Where the request concerns the hearing officer, the issue shall be determined by the board if the board itself hears the case with the hearing officer, otherwise the issue shall be determined by the hearing officer.

NOTE. Authority cited Section 3050, Vehicle Code Reference Section 11723, Vehicle Code.

HISTORY.

1. New Section filed 1-28-76 as an emergency, effective upon filing (Register 76, No. 5).

2. Certificate of Compliance filed 5-28-76 (Register 76, No. 22).

VEHICLE CODE **§ 3050**

§ 3050. Duties

The board shall:

(a) Adopt rules and regulations in accordance with the provisions of Chapter 4.5 (commencing with Section 11371), Part 1, Division 3, Title 2 of the Government Code govern-

ing such matters as are specifically committed to its jurisdiction.

(b) Hear and consider, within the limitations and in accordance with the procedure hereinafter provided, an appeal presented by an applicant for, or holder of, a license as a new motor vehicle dealer, manufacturer, manufacturer branch, distributor, distributor branch, or representative when any such applicant or licensee submits such an appeal provided for in this chapter from a decision arising out of the department.

(c) Consider any matter concerning the activities or practices of any person applying for or holding a license as a new motor vehicle dealer, manufacturer, manufacturer branch, distributor, distributor branch, or representative pursuant to Chapter 4 (commencing with Section 11700) of Division 5 submitted by any person; and, after such consideration, the board may do any one or any combination of the following:

(1) Direct the department to conduct such investigation of such matter as the board deems reasonable, and make a written report on the results of such investigation to the board within the time specified by the board;

(2) Undertake to arbitrate amicably or resolve any honest difference of opinion or viewpoint existing between any member of the public and any new motor vehicle dealer, manufacturer, manufacturer branch, * * * distributor branch, or representative;

(3) Order the department to exercise any and all authority or power that the department may have with

respect to the issuance, renewal, refusal to renew, suspension or revocation of the license of any new motor vehicle dealer, manufacturer, manufacturer branch, distributor, distributor branch, or representative as such license is required under Chapter 4 (commencing with Section 11700) of Division 5.

d) Hear and consider, within the limitations and in accordance with the procedure hereinafter provided a protest presented by a franchisee pursuant to Section 3060, 3062, 3064, or 3065. * * * *A* member of the board who is a new motor vehicle dealer may participate in, * * * hear * * *, *and comment or advise other members upon, but may not* decide, any matter involving a protest filed pursuant to Article 4 commencing with Section 3060) of this chapter.

(Amended by Stats.1973, c. 996, p. 1966, § 14, operative July 1, 1974; Stats.1974, c. 384, p. 952, § 1, urgency, eff. July 5, 1974, operative July 1, 1974; Stats.1975, c. 943, p. 2108, § 4; Stats.1977, c. 278, p. 1171, § 2, urgency, eff. July 8, 1977; Stats.1979, c. 340, p. 1206, § 1, urgency, eff. July 27, 1979.)

§ 3066. Hearings on protests

(a) Upon receiving a notice of protest pursuant to Section 3060, 3062, 3064, or 3065, the board shall fix a time, which shall be within 60 days of such order, and place of hearing and send by registered mail a copy of the order to the franchisor, the protesting franchisee, and all individuals and groups which have requested notification by the board of protests and decisions of the board. The board, or a hearing officer designated by the board, shall hear and

consider the oral and documented evidence introduced by the parties and other interested individuals and groups, and the board shall make its decision solely on the record so made. Government Code Sections 11507.6, 11507.7, except subdivision (c), 11510, 11511, 11513, 11514, 11515, and 11517 shall be applicable to such proceedings.

(b) In any hearing on a protest filed pursuant to Section 3060 or 3062, the franchisor shall have the burden of proof to establish that there is good cause to modify, replace, terminate, or refuse to continue a franchise. The franchisee shall have the burden of proof to establish there is good cause not to enter into a franchise establishing or relocating an additional motor vehicle dealership.

(c) In any hearing on a protest filed pursuant to Section 3064 or 3065, the franchisee shall have the burden to establish that the schedule of compensation or the warranty reimbursement schedule is not reasonable.

(d) * * * *A* member of the board who is a new motor vehicle dealer may participate in, * * * hear * * *, *and comment or advise other members upon, but may not* decide, any matter involving a protest filed pursuant to this article. *Dealer participation shall be recorded in the minutes of the meeting.*

(Added by Stats.1973, c. 996, p. 1970, § 16, operative July 1, 1974. Amended by Stats.1974, c. 384, p. 955, § 6, urgency, eff. July 5, 1974, operative July 1, 1974; Stats.1977, c. 278, p. 1172, § 3, urgency, eff. July 8, 1977; Stats.1979, c. 340, p. 1207, § 2, urgency, eff. July 27, 1979.)